
(1957) 08 AHC CK 0026
In the Allahabad High Court
Case No : F.A.F.O. No. 113 of 1954

Raja Ram Adult

APPELLANT

Vs

Lakshmi Narain Adult

RESPONDENT

Date of Decision : 30-08-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9
Limitation Act, 1908 — Article 163, 2(10), 2(3)
Succession Act, 1925 — Section 263, 268, 295

Citation : AIR 1958 All 149

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Advocate : Dulare Lal Misra and N.P. Asthana, for the Appellant; P.N. Shukla, for the Respondent

Final Decision : Allowed

Judgement

Mukerji, J

1. This is a First Appeal From Order u/s 209 of the Indian Succession Act against an order of the learned District Judge of Kanpur refusing to restore an application for the revocation of a Probate dismissed for default of appearance of the appellant. It is necessary to state a few facts because the order of the Court below is very sketchy and does not give the necessary facts.

2. One Manni died issueless in 1934 leaving behind a house and a widow. The appellant's father Manian was, at the time of his death, the nearest reversioner. Srimati Dulari, the widow of Manni, is alleged to have made a will in favour of Lakshmi Narain, the respondent. Srimati Dulari died on 4th of February, 1946. Lakshmi Narain applied for a Probate to the will of Dulari on 29th of October, 1946.

Lakshmi Narain, in his application for the grant of Probate, did not mention that Manian was close relation of the deceased, and secondly, no notice of the

Probate proceedings was given to Manian. It appears that Manian came to know about the grant of Probate to Lakshmi Narain during the course of the proceedings of a suit -- Suit No. 1396 of 1947 of the Munsif's court.

3. On 17th of January, 1949, Manian applied for the revocation of the Probate. On 21st of June of that year Manian died and Raja Ram, the appellant, was brought on the record of those proceedings in place of Manian deceased. The Probate case dragged on, for adjournment after adjournment was made till on 20th of August, 1952, the learned Judge adjourned the case to an unspecified date for the purpose of fixing a date. This, to my mind, was a peculiar procedure adopted.

One can understand a case being adjourned to a specified date for the purpose of fixing a date, but to adjourn a case without specifying a date to which it is being adjourned for the purpose of fixing a date is something which I have been unable to understand : be that as it may, it was actually done in this case by the learned District Judge of Kanpur. Raja Ram apparently had no knowledge as to whether or not a date had been fixed in the case.

On 15th of December, 1953, Raja Ram learnt that his application for the revocation of the Probate had been dismissed. Soon after Raja Ram inspected the record to find out what exactly had happened and on an inspection of the record Raja Ram came to know that on 5th of August, 1953, i.e., almost a year after the case had been adjourned by the Judge for fixing a date, a date had been fixed in the case.

The date that was fixed by the learned Judge was 5th of September, 1953. Raja Ram could have no knowledge of this date, and indeed, it is surprising to note how the respondent had any knowledge of this date. The case was taken up on 5th of September, 1953, and the application of Raja Ram for the revocation of the Probate, which had been granted to Lakshmi Narain, was dismissed for want of prosecution.

As I have pointed out earlier, Raja Ram came to know about this order sometime on or after 15th of December, 1953, because on that date, namely, on 15th of December 1953, all that Raja Ram knew was that his application had been dismissed. On 12th of January, 1954, Raja Ram made an application for setting aside the order of dismissal and for restoring his application for the cancellation of the Probate to its original number and for its decision on the merits.

This application for the setting aside of the order of 5th of September, 1953, came up before the learned Judge for decision on 22nd of January, 1954. The learned Judge disposed of the application by the following very short order:

"Applicant was represented by two counsel but neither appeared on the date of hearing, viz., 5-9-53. Hence there is no just cause for restoration. Rejected."

Two counsel undoubtedly represented the applicant but neither of these two counsel had any notice of the date which had been fixed by the learned Judge for

the disposal of the case. The learned Judge never troubled to call the counsel on 5th of September, 1953, when the case was taken up. In these circumstances, the fact that the applicant was represented by two counsel could in no way affect the question, whether or not the case should have been restored.

It is impossible to expect that learned counsel would day in and day out be going to the office of the learned Judge to know whether or not a date has been fixed in a case when the learned Judge himself adjourned the matter for the purpose of fixing a date to a date which he did not then mention but which, in the circumstances, must be taken to have been agreed would be notified to parties" counsel, because the purpose of adjourning a case for fixing a date is to know a date which would be convenient to everybody concerned.

On the merits, therefore, I have not the slightest hesitation in holding that the learned Judge was not right in not allowing an application for restoration.

4. On behalf of the respondent it was argued that even if on the merits the application may have been restored, the application having been made beyond the period of limitation, namely, beyond thirty days from the date of dismissal, could not be restored. It was contended by Mr. P. N. Shukla that Article 163 of the Limitation Act applied to the case. On behalf of the appellant it was contended that Article 163 did not apply but the Article that did apply was Article 181.

No direct authority was cited before me but certain cases were cited in order to show that an application for restoration of the type that was made in this case, did not fall within Order 9 of the CPC but came within the purview of Section 151 of the Code and to such applications Article 163 did not apply. Before I come to noticing the cases that were cited I should like to draw attention to the actual provisions of the Article and to determine whether or not the position of Raja Ram. when he made his application, was that of a plaintiff.

5. Article 163 of the Limitation Act is in these words :

By a plaintiff, for an order to set aside a dismissal in default Of appearance or for failure to pay costs of service of process or to furnish security for costs.

Thirty days.

The date of the dismissal.

This Article would apply to a case where "a plaintiff" applies for setting aside a dismissal. The dismissal contemplated in this Article must obviously- be the dismissal of a suit.

6. "Suit" has been defined in the Indian Limitation Act, in Section 2(10), as follows :

"Suit does not include an appeal or an application :"

So that, prima facie Article 163 would not apply to a case where the applicant is

not a plaintiff and where the dismissal is not that of a suit.

7. The proceedings that were initiated by Manian and continued by his son Raja Ram after his death were initiated not by means of a suit but by means of an application. It was an application for the revocation of a Probate, provision for which is made in Section 263 of the Indian Succession Act. u/s 264 of the Indian Succession Act the District Judge has been conferred jurisdiction to grant and revoke Probates and Letters of Administration in all cases within his district.

We are not concerned here to notice the exceptions contained in Sub-section (2) of Section 264. u/s 208 the District Judge has to follow the procedure prescribed in the CPC to regulate the proceedings in respect of grant of Probate and Letters of Administration as far as circumstances permit. This is so for non-contentious cases. In regard to contentious cases the District Judge has to follow the procedure as provided for by Section 295 of the Indian Succession Act. This Section says that

"In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."

The procedure prescribed u/s 295 has, as I have said, to be followed in a case where Probate or Administration proceedings have been contested, in which case it may be argued that the applicant for the grant of a Probate becomes the plaintiff and the opposite party or the objector becomes the defendant, and when such is the position, then the dismissal of the Probate or the Administration matter may amount to the dismissal of a suit of a plaintiff and to such cases Article 163 of the Limitation Act would be applicable when an application for restoration is made.

Can it be said that Section 295 of the Indian Succession Act would apply to proceedings where an applicant applies for the restoration of his application for the revocation of a Probate? It may be mentioned that the application that was made in the present case for restoration was opposed. There was, therefore, a contest in regard to this matter. The revocation application too had been contested.

Therefore, broadly speaking, the matter that was before the Court was a contentious matter but, nevertheless, the question remains, whether this contentious matter could come within the purview of Section 295 of the Indian Succession Act. The application that was preferred by the applicant arose out of a contentious Probate matter.

Therefore, if in that matter the applicant occupied the position of a plaintiff, then the application that he had subsequently made for restoration of the earlier

proceedings would be an application by a person who would be occupying the position of a plaintiff as contemplated by Section 295. If this position is correct -- and speaking for myself I see no reason to doubt that it is not correct -- then the application that was made for restoration was by a person who would be deemed to be a plaintiff for purposes of the proceedings pending in the Court of the District Judge and his application would be deemed to be an application by a plaintiff in a suit and, therefore, in my opinion, Article 163 of the Indian Limitation Act would be applicable.

8. I, therefore, hold that although u/s 2 (10) of the Limitation Act "suit" has been defined not to include an appeal or an application, yet for the purposes of Article 163 the application in this case must be deemed to be an application by a plaintiff.

9. I shall now come to consider the cases which were cited before me.

10. The first case, on which reliance was placed by Mr. Dulare Lal Misra, was the case of Ganesh Prasad Vs. Bhagelu Ram and Others , wherein it was said by a Bench of two Judges that an application for restoring to the file of pending cases an application, which was dismissed for default, for the restoration of a suit dismissed for default, is entertainable, if under no other provision of the Code of Civil Procedure, then u/s 151 of the Code.

That was a case in which an application for restoration had been dismissed and another application was made for the restoration of that application. The question that arose for determination in that case was, whether such an application could lie u/s 9, C. P. C. This case, to my mind, can be of no use for our purposes.

11. Reliance was next placed on the decision of Kaviraj Rai Vs. Sheo Darshan Dass and Others, , where Raghubar Dayal J. held that, where the hearing of an appeal was adjourned but the next date for hearing was not fixed in the presence of the appellant or his counsel and the appellant was not informed of it and the appeal was thereafter dismissed for default then under those circumstances it could not be said that the appeal had been dismissed under the provisions of Order 41, Rule 17 (1), C. P. C., or that the appeal had been dismissed for want of prosecution, and, therefore, he further held that the thirty days" period of limitation prescribed by Article 168 of the Limitation Act did not apply to such an application for the re-admission of the appeal.

This case too has no direct bearing on the case before me. Under Article 168 the application for which the period of limitation is prescribed has to be an application for the re-admission of an appeal dismissed for want of prosecution. On the view of Raghubar Dayal J. the dismissal in the case before him could not be held to be a dismissal for want of prosecution. Therefore, obviously Article 168 did not apply. This case, as I have said, is of no assistance to determine the question that has arisen before me.

12. Reliance was next placed on the decision of *Mt. Zainab Bibi v. Bihari Lal* AIR 1935 Pesh 186 where Mir Ahmad, A. J. C. held that when an application did not fall under Order 9, Rules 8 and 9, C. P. C. but was covered by the provisions of Section 151, C. P. C., then the appropriate Article that applied would be Article 181 of the Limitation Act and not Article 163. This case is distinguishable on the facts but one matter that was decided upon in that case is of some assistance to us in the present case.

It was held by Mir Ahmad, A. J. C. that Article 163 only applies to those cases where the dismissal is for default of appearance and further that there could be a default of appearance only when a party deliberately absents, and in a case where it could not, on the circumstances, be said that the party has failed to appear for some fault of his, it cannot be said that there was any default of appearance and to such a case Article 163 was held not to apply.

In the case before me it cannot be said that the party failed to appear or defaulted in appearance because of any fault of his; the party had not been called upon to appear on any particular date because, as I have already found, no date had been fixed to his knowledge. Therefore, if the view of Mir Ahmad, A. J. C. was right, then on that view the application made by the appellant in the present case could not come within the purview of Article 163 of the Limitation Act.

13. In *Kailash Chandra Vs. Nanda Kumar*, on which reliance was next placed by Mr. Misra, Mukherjea and Sharpe, JJ. held that an order dismissing an application for revocation of Probate, when made in the absence of both the parties, may fall under Order 9, Rule 3 read with Section 141 of the Code of Civil Procedure, but in this case the question of limitation did not arise and, therefore, this case is of little value in determining the question that has arisen before me.

14. On behalf of the respondent Mr. P. N, Shukla relied on the case of *Sree Sree Shyam Sundar Jew v. Hindusthan Co-operative Insurance Society Ltd.* 47 Cal WN 667 wherein Derbyshire, C. J. and Lodge, J., held that an application to set aside an order of dismissal, whether made under Order 9, Rule 9 of the CPC or otherwise, would be controlled by Article 163 of the Limitation Act.

15. On a careful consideration of the entire matter and the observations made in cases cited above I am of the opinion that in this case even though the appellant must be deemed to have occupied the position of a plaintiff by virtue of Section 295 of the Indian Succession Act and that the application which was made by the appellant would be deemed to be an application by a plaintiff in a suit for the restoration of that suit, yet it could not under the circumstances be said that the application was "to set aside a dismissal for default of appearance."

There can be default of appearance only when a party has been called upon to appear on a particular date and he has knowledge that he has been so called upon to appear. There can, in my view, be no default of appearance when a party has not been apprised of the date fixed for the appearance. It would be most

unjust if we were to give any other meaning to the expression "default of appearance", for then in a case in which a date is fixed without the knowledge of the party, the party will naturally never be able to appear and may not, as in the present case, know of the dismissal till long after thirty days have expired from the order of dismissal.

The facts of the instant case clearly indicate that the appellant could not appear on 5th of September, 1953, when his application was dismissed, because the Court had failed to notify to him the date that had been fixed in the case. It would be grossly unjust to deny him the right to have his cause determined, because for no fault of his he could not appear on a certain date.

The rules of limitation are not meant to destroy the rights of parties : they are meant to see that parties do not resort to dilatory tactics but seek their remedy within , a time fixed by the Legislature. The time must, therefore, be deemed to run from the moment when there is knowledge and not from any hypothetical point, on the assumption of knowledge.

16. For the reasons given above, I am of the opinion that this appeal should be allowed and the order of the learned District Judge set aside. I accordingly set aside the order of the learned District Judge and send the case back to the Court below for decision of the application for the revocation of the grant of Probate in favour of Lakshmi Narain made on 17th of May, 1947. Parties will bear their own costs.